STATE OF MICHIGAN

COURT OF APPEALS

DUSTIN LEE LYONS,

Plaintiff-Appellant,

v

JESSICA LEE COTTRELL,

Defendant-Appellee.

UNPUBLISHED
March 22, 2011

No. 298058
Gladwin Circuit Court
LC No. 2009-004709-DS

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order awarding plaintiff and defendant joint legal custody and defendant sole physical custody of the parties' two children. Because the trial court's finding that the children did not have an established custodial environment with plaintiff was against the great weight of the evidence, we reverse and remand.

The trial court held that an established custodial environment did not exist with either party. In making this determination, it divided its custodial environment analysis into two time periods: (1) from June 2008 to July 2009, the period before plaintiff's incarceration when plaintiff, defendant, and the children primarily[1] resided in one household and (2) from July 2009 to the time of trial, the period after plaintiff's incarceration when plaintiff and the children lived together and defendant lived in Detroit. The trial court found an established custodial environment existed with defendant before plaintiff's incarceration. It further found that this established custodial environment was extinguished after plaintiff's incarceration. It concluded that an established custodial environment never existed with plaintiff. Consequently, the trial court used the preponderance of the evidence standard to determine custody of the two children.

On appeal, plaintiff argues that the trial court erred in finding that the children did not have an established custodial environment with him. We agree.

[1] Defendant moved from the house, where she and plaintiff lived with the children into an apartment in August or September 2008, and then moved back into the house in February 2009.

We review a trial court's findings regarding the existence of an established custodial environment under the great weight of the evidence standard. *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). "A finding is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id.* at 706.

An established custodial environment exists if

> over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

"An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger*, 277 Mich App at 706. If an established custodial environment exists with one parent or with both parents, a trial court may not change the custodial environment unless there is clear and convincing evidence that a change in the custodial environment is in the child's best interests. MCL 722.27(1)(c); *In re AP*, 283 Mich App 574, 601-602; 770 NW2d 403 (2009). However, if no established custodial environment exists, the trial court may change custody or enter a custody order if a preponderance of the evidence establishes that the change serves the child's best interests. *Pierron v Pierron*, 282 Mich App 222, 245; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010).

After hearing testimony from the parties, the trial court stated its findings regarding time period (1):

> Just because a couple is living together that have kids between themselves, doesn't mean that automatically that's an established custodial environment.
>
> The testimony was rather, if not exclusively on the point, that during that tenure it was the mother that took care of the running, so to speak, that goes with raising children. Making the medical appointments, meeting the medical appointments, taking care of child care, meeting the child care commitment, all of those sorts of things.

Regarding time period (2), the trial court stated:

> [T]here is some merit in that once he got out of jail on July thirtieth that the primary circumstances were such that the established custodial environment was with the father. But this is just because of time and distance and lack of transportation. It isn't because of any kind of default on the mother's behalf.

Contrary to the trial court's statement regarding time period (1), we note that the testimony was not "exclusively on [] point" that defendant ran the household before plaintiff was incarcerated. Rather, defendant's own testimony was that both she and plaintiff provided the "day-to-day care" for the children during this period. In addition, plaintiff testified that he primarily took care of the children. He explained that he gave them baths, cooked them dinner,

took them to the doctor, did their laundry, bought them clothes, and played with them. And during the August-February separation period, plaintiff testified that the children lived with him four to five days a week. Further, defendant said that during this period of separation, she would have the children every other day during the week and every other weekend.

Based on the parties' testimony regarding time period (1), we find the trial court's finding that an established custodial environment existed with defendant, but not with plaintiff, to be against the great weight of the evidence. *Berger*, 277 Mich App at 706. The evidence established that plaintiff consistently participated in providing the care, discipline, love, guidance, and attention that the children required during the period before his incarceration. *Id.*

Regarding time period (2), the testimony showed that plaintiff lived with the children and his mother in Rhodes, Michigan, and Bentley, Michigan,[2] and defendant lived in Detroit. Plaintiff testified that he had no problems raising the children in defendant's absence. He continued to cook for them, do their laundry, and get them ready for school. He introduced documents indicating that the oldest child, whom he had enrolled in a wrestling program, was performing above average in school. He and the children participated in school and outdoor recreational activities together, including four-wheeling, fishing, raising farm animals, building snowmen, and snowmobiling. Plaintiff testified that he took the children to get their vaccinations, took the youngest child to get a biopsy on his leg, and took the oldest child to get his tonsils checked. Plaintiff's mother testified that plaintiff was a good parent who provided the children food and clothes, and made sure they got up for school. During this period, defendant saw the children much less frequently than plaintiff. She exercised parenting time one weekend in October 2009, one week around Christmas, and one weekend in both January and February 2010.

In making its findings regarding time period (2), we conclude that the trial court improperly concerned itself with the reasons behind the custodial environment. *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992) ("In determining whether a custodial environment exists, the court's concern is not with the reasons behind the custodial environment, but with the existence of such an environment."). Here, without taking into consideration the reasons behind the custodial environment, the evidence shows that after he was released from incarceration, plaintiff provided the care, discipline, love, guidance, and attention that the children required. Accordingly, a custodial environment existed with plaintiff. *Berger*, 277 Mich App at 706.

In sum, we conclude that at the time of trial in this case the evidence established that a custodial environment existed with plaintiff. Except during his period of incarceration, a time period during which the children were primarily cared for by plaintiff's mother, plaintiff

---

[2] We note that when plaintiff went to jail, the children, with defendant's permission, went to live with plaintiff's mother. Plaintiff's mother testified that they had no intent to change the current living arrangement.

consistently provided the care, discipline, love, guidance, and attention that the children required. *Berger*, 277 Mich App at 706.

Because an established custodial environment existed with plaintiff at the time of trial, the trial court could only change the custodial environment if there was clear and convincing evidence that such a change was in the children's best interest. MCL 722.27(1)(c); *In re AP*, 283 Mich App at 601. The trial court's use of the preponderance of the evidence standard, appropriate only where there is no established custodial environment, *Pierron*, 282 Mich App at 245, was clear legal error. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

Next, plaintiff argues that the trial court erred in its findings on factors (c) and (f) of the best interests factors, MCL 722.23. We disagree.

We review a trial court's findings regarding each best interest factor under the great weight of the evidence standard. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). The trial court's findings should be affirmed unless the evidence preponderates in the opposite direction. *Berger*, 277 Mich App at 705.

Factor (c) concerns "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care[.]" MCL 722.23(c). We find no merit to plaintiff's argument that, because at the time of trial he received more money in unemployment benefits than defendant earned in income, the trial court erred in finding the parties equal on factor (c). Regarding factor (c), this Court has stated:

> Factor c does not contemplate which party earns more money; it is intended to evaluate the parties' *capacity* and *disposition* to provide for the children's material and medical needs. Thus, this factor looks to the future, not to which party earned more money at the time of trial, or which party historically has been the family's main source of income. [*Berger*, 277 Mich App at 712 (emphasis in original).]

Although plaintiff "earned" more money than defendant at the time of trial, it was the parties' future capacity to provide for the children's needs that mattered. Plaintiff's unemployment benefits, which he relies on to support his argument, were set to expire a few months after trial. On the other hand, defendant had one semester left until she received her bachelor's degree, which would allow her to work full time. Given the uncertainty surrounding plaintiff's future income and an expected increase in defendant's income, along with the trial court's finding that neither party would let the children go without anything they needed, the court's finding that factor (c) favored neither party was not against the great weight of the evidence.

Factor (f) concerns "[t]he moral fitness of the parties involved." MCL 722.23(f). Plaintiff argues that the trial court's finding that factor (f) favored defendant was against the great weight of the evidence because the court failed to explain how his criminal history influenced his ability to parent. In *Fletcher*, 447 Mich at 886-887, our Supreme Court stated:

> Factor (f) (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that

> relationship. Thus, the question under factor f is *not* "who is the morally superior adult"; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*. [Emphasis in original.]

It went on to explain that "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors" "represents the type of morally questionable conduct relevant to one's moral fitness as a parent." *Id.* at 887 n 6. Because our Supreme Court has specifically stated that the offenses in defendant's criminal past, which were primarily drinking and driving offenses, are relevant to a parent's moral fitness, the relationship between the offenses and plaintiff's moral fitness cannot be questioned. Accordingly, the trial court did not err in failing to explain how plaintiff's criminal past impact his moral fitness, and its finding that factor (f) favored defendant was not against the great weight of the evidence.

Because the trial court used the wrong standard in deciding plaintiff's custody request, we reverse the trial court's order and remand for a new decision in which the trial court utilizes the clear and convincing standard.

Reversed and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ Michael J. Talbot